

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

FRIENDS OF ANIMALS,

Plaintiff,

v.

GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, and
UNITED STATES FOREST SERVICE, an agency of the United States,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, Friends of Animals, brings this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Specifically, Friends of Animals challenges the failure of Defendants George Ervin "Sonny" Perdue III and the United States Forest Service (USFS) to provide responsive documents within the time required under FOIA.

2. On April 9, 2018, Friends of Animals submitted a FOIA request to USFS for documents and records held by the USFS for the time period starting April 9, 2017 through the date of the FOIA request related to the December 22, 2017 Intergovernmental Agreement between the Arizona Department of Agriculture (AZDA) and the USFS, IGA No. AZDA-OOD-001; FS #18-CS-11031200-009 (hereinafter, "Salt River Wild Horse Management Agreement") (FOIA Case Number 2018-FS-R3-03416-F).

3. Friends of Animals requested all records, whether received, created, and/or distributed by USFS, that relate to or mention: (1) management of horses in the Tonto

National Forest; (2) the Salt River Wild Horse Management Agreement; and (3) any communications with AZDA and/or third parties relating to the management of the horses in the Tonto National Forest.

4. Federal Defendants released interim responses on both July 13, 2018 and November 6, 2018.

5. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Friends of Animals' April 9, 2018 FOIA request.

6. Federal Defendants are unlawfully withholding public disclosure of information that Friends of Animals is entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving Friends of Animals' request within the time required by law. Accordingly, Friends of Animals seeks declaratory relief establishing that Defendants have violated FOIA. Friends of Animals also seeks injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

8. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552 (a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiff and Defendants. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

9. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in the district where the complainant resides or has a

principle place of business. Plaintiff, Friends of Animals' Wildlife Law Program resides in Colorado and has a principal place of business in Centennial, Colorado. Venue is also proper under 28 U.S.C. § 1391(b) because Defendant is subject to the Court's personal jurisdiction in this judicial district.

PARTIES

10. Plaintiff, FRIENDS OF ANIMALS, is a not-for-profit international advocacy organization incorporated in the State of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues, and the organization's progress in addressing these issues, through its magazine, *Action Line*, its website, social media, and other reports. Friends of Animals has published articles and information advocating for the protection of wildlife species, including horses, so that they can live unfettered in their natural habitats. Friends of Animals regularly submits requests under FOIA to further its goals and missions. Defendants' refusal to comply with FOIA injures Friends of Animals, its members, and its staff by preventing them from using the requested information to advocate for their mission.

11. Defendant, GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, has ultimate responsibility for USFS and ensuring that the agency complies with federal law.

12. Defendant, UNITED STATES FOREST SERVICE, is a federal agency within the United States Department of Agriculture. USFS is responsible for fulfilling Plaintiff's request and complying with all federal laws.

LEGAL FRAMEWORK

A. Freedom of Information Act.

13. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. *Dep’t of State v. Ray*, 502 U.S. 164 (1991). Upon written request, FOIA requires agencies of the United States government to promptly disclose their records, unless the government can lawfully withhold the records from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The burden is on the government—not the public—to justify why particular information may be withheld. *Ray*, 503 U.S. at 164.

14. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor” and, in the case of an adverse determination, the right of such person to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

15. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* § 552(a)(6)(C).

16. In “unusual circumstances” an agency may extend the time limits up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

17. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

18. Additionally, if the agency fails to comply with the statutory time limit, it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

19. Friends of Animals submitted its FOIA request to USFS on April 9, 2018.

20. Friends of Animals requested “copies of all documents and records held by the United States Forest Service (USFS) for the time period starting April 9, 2017 through the date of this FOIA request relating to the December 22, 2017 Intergovernmental Agreement between the Arizona Department of Agriculture (AZDA) and the USFS, IGA No. AZDA-OOD-001; FS #18-CS-11031200-009.”

21. Specifically, Friends of Animals requested all records in the possession of USFS “that relate to or mention: (1) management of horses in the Tonto National Forest; (2) the Salt River Wild Horse Management Agreement; and (3) any communications with AZDA and/or third parties relating to the management of the horses in Tonto National Forest.”

22. Friends of Animals received an email from USFS acknowledging receipt of the request on April 16, 2018 and a letter confirming that request on or around April 19, 2018. USFS assigned the request Case Number 2018-FS-R3-03416-F.

23. On May 1, 2018, Friends of Animals received a letter stating that the request had been rerouted to the Southwestern Region FOIA/PA Service Center for review.

24. FOIA’s twenty workday deadline for responding to Friends of Animals’ request passed on May 17, 2018.

25. USFS did not respond by May 17, 2018.

26. On May 21, 2018 and May 30, 2018, Friends of Animals sent emails to the FOIA contact listed on the April 19, 2018 confirmation letter asking for the status of the FOIA request. Friends of Animals received no response.

27. On June 7, 2018, Friends of Animals sent an email to USFS's Government Information Specialist asking about the status of the FOIA request. On the same day, USFS's Regional Litigation Coordinator responded stating that USFS would "strive to review and release documents by the end of the month."

28. On July 3, 2018, after receiving no documents, Friends of Animals once again emailed USFS to ask about the status of the request. USFS responded stating that it would have a partial response by the end of the week.

29. USFS provided the first interim responses on July 13, 2018.

30. On September 7, 2018, Friends of Animals sent an email to a new FOIA contact in USFS's Southwestern Region to ask about the status of the request. On September 13, 2018, Friends of Animals received an email stating that the request was "21st in the overall queue for all requests in the region" but "third in line" for review.

31. On October 3, 2018, Friends of Animals received an email stating that USFS hoped to complete the request by the end of the month.

32. USFS provided the second interim response on November 6, 2018.

33. On January 29, 2019, following the government shutdown, Friends of Animals sent an email to USFS's Southwestern Region to ask about the status of the final release of documents. USFS declined to provide a date for when the request would be completed, and instead noted that the "remaining documents are emails which may need redaction of sensitive material which is time consuming."

34. On April 29, 2019, well over a year after Friends of Animals submitted its request, Friends of Animals sent yet another email asking about the status of the request. USFS responded stating that USFS would complete the request "as soon as practicable" but

noted that there were over 40 requests in the queue and about half predated Friends of Animals' request.

35. On May 22, 2019, Friends of Animals sent a final email asking about the status of the request and specifically requested a date of completion.

36. USFS declined to provide a date of completion.

37. USFS responded that requests are reviewed on a "first in, first out basis" and it would resume review of our request after older requests were completed.

38. As of the date of this Complaint, USFS has still not made a final determination in response to Friends of Animals' FOIA request.

39. USFS has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will finally be able to comply with its obligations under FOIA.

40. USFS is unlawfully withholding public disclosure of information sought by Friends of Animals, information to which Friends of Animals is entitled to receive, and for which USFS has not provided a valid disclosure exemption.

CLAIM FOR RELIEF
(Violation of the Freedom of Information Act)

41. Friends of Animals herein incorporates all information and allegations contained in the preceding paragraphs.

42. Friends of Animals properly requested records within the control of Defendants.

43. Defendants have failed to fully release the records Friends of Animals requested and failed to make any claims of statutory exemption regarding the requested records.

44. Accordingly, Friends of Animals is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Friends of Animals respectfully requests that the Court enter judgment providing the following relief:

- A. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiff's request under the Freedom of Information Act;
- B. Order Defendants to process and release immediately all records responsive to Plaintiff's request at no cost to Plaintiff;
- C. Retain jurisdiction of this action to ensure the processing of Plaintiff's request, and to ensure that no agency records are wrongfully withheld;
- D. Award Plaintiff costs, including reasonable attorney fees and litigation costs in this action, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E); and
- E. Grant Plaintiff any other relief that the Court deems just and proper.

Dated: May 28, 2019

Respectfully submitted,

/s/ Courtney R. McVean
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